U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE E. GOBBLE and U.S. POSTAL SERVICE,
POST OFFICE, West Palm Beach, FL

Docket No. 03-855; Submitted on the Record;
Issued August 12, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective November 3, 2001, on the grounds that her work-related disability had ceased on or before that date.

On January 21, 1984 appellant, then a 29-year-old distribution clerk, sustained a contusion to the forehead and a cervical strain when a shelf fell, striking her head. She stopped work on January 23, 1984 and returned to work on April 22, 1984 under medical restrictions. The Office accepted appellant's claim for contusion to the forehead and cervical strain in February 1984 and expanded the claim to include cervical syndrome with radiculopathy.[1]

This case was previously on appeal before the Board.[2]

In a decision dated August 10, 1990, the Office determined that appellant's reemployment as a scale technician with the employing establishment effective October 14, 1988 fairly and reasonably represented her wage-earning capacity.

[1] Appellant stopped work on January 8, 1992.

[2] Docket No. 95-1402. In a December 5, 1997 decision, the Board affirmed the Office's December 27, 1994 decision which found that appellant received an overpayment of compensation in the amount of $1,058.96 for the period June 28, 1992 to January 8, 1994, because deductions for her health benefits were not made and for the period January 9 to November 12, 1994, because deductions for an incorrect health code were made. Appellant was not at fault in the creation of the overpayment and she was not entitled to waiver. The Office properly recovered the overpayment by withholding $105.00 from appellant's continuing compensation benefits. The record also indicates that appellant subsequently married and is now known as Valerie Gobble. On appeal appellant indicated that she was appealing the August 28, 2002 decision wherein the Office hearing representative found that her disability had ceased on or before November 3, 2001.

The Office subsequently developed the record and, in a July 26, 1994 decision, denied appellant's claim for compensation for total disability. The Office determined that she did not present sufficient medical evidence to establish that her ear/dizziness problem was causally related to the January 21, 1984 employment injury. The Office further advised appellant that once a formal loss of wage-earning capacity decision had been issued, the rating should be left in place unless there was a change in the nature and extent of the injury-related condition or a change in the nature and extend of the light-duty requirements. The Office determined that the evidence of record failed to demonstrate that the injury of January 21, 1994 resulted in total disability for work for the dates claimed.

By decision dated September 18, 1998, the Office denied modification of its prior decision.[3]

In a January 7, 1999 report, Dr. Stone indicated that when he saw appellant, she had a workup that showed a small disc derangement at C5-6 or spondylosis. He explained that her initial injury was a cervical spine strain characterized by disc derangement which went on to cause degenerative changes and spondylosis. He explained that the equilibrium problem had two possible causes, either trauma related or due to an ear problem such as ear infection, which she never had. Dr. Stone indicated that it appeared subsequent to the trauma and it waxed and waned when appellant's neck pain worsened signaling a causal relationship and temporal relationship between the worsening of appellant's dizziness with the worsening of her neck symptoms. He diagnosed cervical spondylosis, sequelae of disc derangement and dizziness as a sequelae of the original trauma.

On May 7, 1999 the Office notified appellant of a second opinion examination with Dr. Harold C. Friend, a Board-certified psychiatrist and neurologist.

In a report dated May 24, 1999, Dr. Friend diagnosed chronic pain syndrome, minimal cervical spondylosis and disequilibrium with nystagmus. He opined the diagnoses were causally related to the accepted employment injury with regard to her cervical spondylosis. Dr. Friend explained that there was a considerable question as to the dizziness, since although she complained of it on February 15 and February 20, 1984, there was no other medical evidence until January 11, 1991. Regarding appellant's complaints of subjective pain as related to the work injury, there was a limited range of motion in her cervical spine that was consistent with the objective complaints of pain and that she had residual impairment related to the accepted injury. Dr. Friend indicated that appellant could not perform her date-of-injury duties as a distribution clerk for eight hours a day, indicating that the maximum she could work would be four hours. He noted that appellant had physical restrictions that would include sitting with the ability to move about freely and no lifting. However, he opined that her dizziness would preclude her from working. Dr. Friend indicated that appellant had reached maximum medical improvement and recommended no further treatment.

[3] In this decision, the Office found that there was insufficient medical reasoning to support that appellant's vestibular hypofunction was caused by the accepted employment injury.

In a September 17, 1999 report, Dr. Ross G. Stone, a Board-certified orthopedic surgeon, indicated that appellant had cervical spondylosis and ear, nose and throat problems causing difficulty walking due to disequilibrium.

In an October 8, 1999 report, Dr. Andrew Weiss, a Board-certified anesthesiologist, indicated that appellant was seen with respect to management of chronic pain secondary to a work-related injury of January 21, 1984. He noted that appellant had cervical pain, but more recently, she began having increasing amounts of cervical radicular pain with numbness. Dr. Weiss stated that a physical examination demonstrated a decrease in two point discrimination and sensory discrimination in the right hand in a nondermatomal pattern. He indicated that he would like to order a magnetic resonance imaging (MRI) scan of the cervical spine in an attempt to further evaluate her.

In a November 4, 1999 MRI scan of the cervical spine, Dr. Richard Bajakian, a Board-certified radiologist, found a negative study with the exception of a tiny central protrusion at C5-6 with impression in the thecal sac in the midline, with diffuse disc dessication.

In a January 10, 2000 report, Dr. Weiss indicated that appellant's cervical MRI scan demonstrated a small disc herniation at the C5-6 level with no lateralization. He opined that she still had intermittent right-sided arm and hand numbness. In a June 5, 2000 report, Dr. Weiss indicated that appellant was seen for management of persistent pain and was status post a recent cervical epidural injection, which was highly effective. He requested a repeat cervical epidural injection.

By letters dated September 11 and 20, 2000, the Office requested additional information from Dr. Weiss.

In a November 10, 2000 response, Dr. Weiss indicated that appellant was discharged from his care on June 27, 2000 due to multiple appointment cancellations and no-shows. He indicated that appellant appeared to have persistent, chronic cervical pain secondary to her work-related injury of 1984 and indicated that, with respect to whether she was capable of performing her duties as a distribution clerk for an eight-hour per day period of time, he did not believe that she would be able to do that. Dr. Weiss indicated that she had not proven that she could show up for an appointment, never mind show up for a job. He answered "yes" to whether he believed that appellant could work, but he did not believe that she would be responsible enough to work.

By letter dated December 7, 2000, the Office referred appellant for a second opinion examination.[4]

In a January 2, 2001 report, Dr. Robert Green, a Board-certified orthopedic surgeon, diagnosed residual cervical syndrome with no objective findings; and residual equilibrium problems due to inner ear problems. He noted that he was not qualified to comment on inner ear problems and noted a history of a personality disorder. Dr. Green opined that he believed there

[4] The record contains a notice from appellant dated October 28, 2000 wherein she indicated that her primary care doctor was Dr. Robert Green of Lake Park, Florida. This appears to be a different Dr. Green from the second opinion physician of the same name of West Palm Beach, Florida.

was a relationship to appellant's present condition due to the injury of January 21, 1984. From an orthopedic point of view, he could find no objective findings and the MRI scan, showing a small disc protrusion, was certainly not unusual. He indicated that there was an overall disability based on all of her complaints but it was difficult to establish why she should be having these problems from an orthopedic point of view. Dr. Green explained that the complications that occurred were basically equilibrium problems which were contributing significantly to her condition and which seemed to preclude her from gainful employment. He opined that this needed to be resolved before any consideration could be given towards her new work status.

The Office requested clarification and, in a January 16, 2001 addendum, Dr. Green indicated that the contusion of the forehead and the cervical strain had resolved. He noted that from an objective point of view, he could find no indication for residual problems. Dr. Green indicated that appellant's current condition was related to the work injury by direct cause and the subjective complaints were not in line with the objective findings. Regarding residuals, he indicated that they were based purely on subjective complaints and not on objective findings. Dr. Green explained that, based on the findings of the cervical spine, he believed that appellant was capable of doing sedentary type work and deferred to a specialist with regard to appellant's problems with equilibrium. Regarding appellant's date-of-injury job as a distribution clerk and whether she was capable of working eight hours a day, he opined that he did not find any contraindication that she was working and that she had reached maximum medical improvement. Dr. Green recommended no further orthopedic treatment.

The Office again requested clarification and, in a March 8, 2001 supplemental report, Dr. Green indicated that there were, subjective complaints of pain unsupported by objective findings and appellant had no residual disability. Further, he stated that appellant had a balance problem which was beyond his sphere of knowledge. Dr. Green opined that appellant could do sedentary work eight hours per day and any problems with equilibrium should be discussed with the appropriate specialist.

On April 10, 2001 the Office issued a proposed notice of termination of compensation. The Office advised appellant that her compensation for wage-loss and medical benefits was being terminated because she no longer had any continuing injury-related disability. The Office indicated that the weight of the medical evidence, as demonstrated by the opinion of Dr. Green, demonstrated that appellant's work injury had resolved. Appellant was given 30 days to submit additional evidence or argument.

On May 2, 2001 the Office received an undated letter and additional information from her, consisting of duplicative medical reports.

On August 9, 2001 the Office advised appellant that a conflict in the medical evidence existed and referred her to Dr. Joseph R. Purita, a Board-certified orthopedic surgeon, to resolve the conflict.

In an August 24, 2001 one page report, Dr. Purita, indicated that the physical examination showed no major clinical deformity of the cervical spine. He reported examination findings including pain on range of motion of the cervical spine especially with extremes of motion and increased pain with cervical compression and distraction. Dr. Purita indicated that

all major motor groups and upper extremities were rated at 5/5 and the reflexes were bilaterally and rated at +2. He found that sensation and neurovascular status was intact. Dr. Purita also found that appellant had a bit of discomfort involving the thoracic spine, but there was nothing that he was impressed by on physical examination. He noted that appellant was ambulating with a cane and she appeared to have some difficulty with her gait possibly secondary to a balance problem. Dr. Purita indicated that his recommendations "were really not much different than the recommendations of Dr. Green and a number of other doctors." He opined that "her ongoing problems are causally related to her injury of 1984" but noted that he thought much of her injury dealt more with an ear, nose and throat problem rather than an orthopedic problem. Dr. Purita did not believe that there was any obvious orthopedic care that was needed at this time although she might occasionally need to get some orthopedic care and be placed on some anti-inflammatories.

By letter dated September 17, 2001, the Office requested clarification from Dr. Purita regarding whether appellant was capable of working an eight-hour a day sedentary job as a distribution clerk.

On October 12, 2001, the Office received a handwritten response from Dr. Purita, in which he noted, "I feel [that] she is able to work eight hours/day in a sedentary job." Regarding whether appellant was capable of working her date-of-injury job as a distribution clerk for eight hours a day, he stated, "I feel she can work this job." He also noted, "I feel her ongoing problem is ENT related."

By decision dated October 24, 2001, the Office terminated appellant's compensation benefits. The Office indicated that Dr. Purita's opinion remained the weight of the medical evidence.

By letter dated November 13, 2001, appellant requested a hearing, which was held on June 12, 2002.

By decision dated August 28, 2002, the Office hearing representative affirmed the October 24, 2001 decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective November 3, 2001.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[5] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[6] The Office's burden includes the

[5] *Lawrence D. Price,* 47 ECAB 120 (1995).

[6] *Id; see Patricia A. Keller,* 45 ECAB 278 (1993).

necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

Appellant's physician, Dr. Weiss, reported that appellant could work, but only four hours a day. Dr. Green, a second opinion physician, indicated that appellant's accepted conditions had resolved and found that she could return to work in her date-of-injury position for eight hours a day. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of her accepted employment injuries and remained disabled for work, the Office properly referred her, to Dr. Purita for an impartial examination.[8]

In an August 24, 2001 report, Dr. Purita, noted his physical examination and reported his findings on examination, including pain on ROM of the cervical spine. He examined appellant's major motor groups, upper extremities and reflexes. Dr. Purita concluded his examination by indicating that his recommendations "were really not much different than the recommendations of Dr. Green and a number of other doctors." When the Office requested clarification from Dr. Purita and requested full details for his opinion, Dr. Purita merely stated, "I feel [that] she is able to work eight hours/day in a sedentary job." He also indicated that she was capable of performing her date-of-injury job. These one sentence notations are not explained and are inconsistent as to adequately describing appellant's residuals or work limitations.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9] In this case, however, Dr. Purita merely noted his general agreement with the second opinion referral physician without providing a rationalized medical opinion to support his stated conclusions. In *Frederick Justiniano*,[10] an impartial medical specialist indicated his agreement with a referral physician without providing a further medical explanation for his opinion. The Board found that the reports of the impartial medical specialist were of diminished probative value without supporting medical rationale and were not a sufficient basis to terminate compensation.[11] Dr. Purita's reports do not provide sufficient medical explanation of his own to support his conclusions. His reports do not constitute a well-reasoned medical opinion.

It is, as noted above, the Office's burden to terminate compensation. The Board finds that the Office did not meet its burden in this case.

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[7] *Raymond W. Behrens,* 50 ECAB 221 (1999).

[8] 5 U.S.C. § 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes,* 43 ECAB 510 (1992).

[9] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[10] 45 ECAB 491 (1994). In that case the impartial specialist made statements such as "I must agree with [the referral physician's] conclusion that the patient has an underlying personality disorder" and "I also agree such adjustment disorder would have long since resolved without residuals."

[11] *Id*. at 497.

The August 28, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 12, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member